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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL HERNANDEZ,

Defendant and Appellant.

B210246

(Los Angeles County  
Super. Ct. No. LA056669)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Susan M. Speer, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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After a two-day crime spree involving multiple victims, a jury convicted Angel Hernandez (appellant) of nine counts of second degree robbery (Pen. Code, § 211;<sup>1</sup> counts 1-3, 5, 9, 12, 16-18), two counts of attempted second degree robbery (§§ 664, 211; counts 4, 6), two counts of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); counts 7, 11), and one count of assault with a firearm (§245, subd. (a)(2); count 14). The jury also found true allegations that in counts 1 through 7, 12, 14, 17, and 18, appellant personally used a firearm in the underlying offenses, and in counts 3, 5 through 7, 12, and 18, that a principal was armed with a handgun. (§§ 12022.53, subd. (b); 12022, subd. (a)(2).) Appellant admitted that he suffered a prior conviction for a serious felony, which qualified as a strike under the Three Strikes Law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court sentenced appellant to 63 years in state prison.

On appeal, appellant contends: (1) the trial court deprived appellant of his federal constitutional rights to due process and a fair trial by permitting appellant's girlfriend to testify about acts of domestic violence appellant committed against her; and (2) the trial court deprived him of his federal constitutional right to a fair trial when it permitted the prosecution to impeach appellant with evidence that he committed domestic violence against his ex-wife. We affirm.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

## BACKGROUND<sup>2</sup>

### I. The Prosecution

#### A. *The Crime Spree*

##### 1. Count 17

On August 24, 2007, at approximately 9:30 p.m., Alberto Cortez (Cortez) was inside his car, which was parked in a K-Mart lot. Appellant approached Cortez's car, opened the driver's side door, and pointed a gun at Cortez's ribs. Upon seeing the gun, Cortez felt "really scared." Appellant demanded that Cortez "give him everything," and subsequently took Cortez's wallet and car keys. Cortez saw appellant leave in a white Ford F-150 pickup truck. Cortez described the gun as an automatic and possibly black in color.

##### 2. Counts 1 and 2

On August 24, 2007, at approximately 9:40 p.m., Luis Ramos (Ramos) and Delmy Hernandez<sup>3</sup> (husband and wife) were walking on a public street when a white Ford pickup truck pulled up next to them. Appellant and his girlfriend, Norma Aguirre (Aguirre), exited the pickup truck and approached the couple. Appellant pointed a gun at Ramos and demanded that Ramos "give him everything [he] had." Ramos complied and gave appellant his wallet. Ramos testified that the gun looked like a revolver and was dark in color. Meanwhile, Aguirre directed Delmy to drop her purse. Delmy refused but after a struggle with appellant, she relinquished her purse to him.

##### 3. Count 18

On August 25, 2007, at approximately 1:10 p.m., Karla Aguilar (Aguilar), her son, and her fiancé, Giovanni Solano (Solano), were in the parking lot of a Target store. After

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<sup>2</sup> The underlying trial took place over the course of nine days. In this section, we recount only those facts necessary to understand the issues raised on appeal.

<sup>3</sup> Because Delmy Hernandez and appellant share the same last name, we will hereinafter refer to the former by her first name.

strapping her son into his car seat, Aguilar sat in the front passenger seat of her car. A white pickup truck pulled up behind Aguilar's parked car. Appellant approached Solano, who was not yet inside the car, pointed a gun at Solano, and demanded Solano's money. Solano, who testified that he glanced at the gun constantly as appellant pointed it at him, described the gun as black with a chipped and faded brown handle. Solano gave appellant his wallet and car keys, and explained to appellant that a child was in the car. Appellant looked inside the car, saw Aguilar's son, apologized to Solano, and returned Solano's wallet and keys. Another man, Jeremillas Reynoso (Reynoso)<sup>4</sup>, exited the pickup truck and grabbed Solano's car keys and wallet from him. Appellant directed Reynoso to return the items to Solano. Reynoso complied with appellant's direction and they left in the pickup truck. Solano trailed behind the pickup truck for over a block so that Aguilar could write down the license plate.

Aguilar described the gun that appellant pointed at Solano as a black revolver with a brown handle. She could see bullets "sticking out" of the gun.

#### 4. Counts 12 and 14

On August 25, 2007, at 1:30 p.m., Maria and Santos Lopez<sup>5</sup> (husband and wife) were loading groceries into their car, which was parked in a Superior Supermarket lot. Appellant and Reynoso approached them on foot and began hitting Santos, who was 71 at the time. They struck him several times in the head and kicked him several times in the stomach. Appellant shoved a gun against Santos's ribs and demanded money from him. Santos described the gun as a revolver that appeared black in color. Maria begged them to stop hitting Santos because Santos had recently undergone surgery. Appellant pointed the gun at Maria's head and told her he would shoot her if she screamed. Appellant and

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<sup>4</sup> Reynoso was tried as a codefendant on some of the counts in the underlying trial. He is sometimes referred to in the record by his alias, Jeremillas Velasquez.

<sup>5</sup> Because they share the same last name, we will refer to Maria and Santos by their first names.

Reynoso took Santos's wallet and ran toward a white Ford pickup truck, which was parked nearby.

#### 5. Counts 10 and 11

On August 25, 2007, at 1:50 p.m., George Mattar (Mattar) was loading groceries into his car, which was parked in a 99 cent store lot. Appellant and Reynoso approached Mattar, and Reynoso shoved a gun against Mattar's ribs, demanding his money. Reynoso used enough force with the gun to leave bruises on Mattar's ribs. Mattar described the gun as metal bluish-gray in color. Appellant pressed Mattar against the door of his car, scratched his face, and then took his wallet.

#### 6. Counts 5, 6, 7, and 8

On August 25, 2007, at 2:05 p.m., David Margolis (Margolis) and his friend Vinicius Melo were about to enter Margolis's home when appellant approached them. Appellant pointed a gun at Margolis and said: "Give me everything you got." Margolis handed appellant his wallet, looked at the gun, felt nervous, and said: "Don't shoot, don't shoot." Margolis described the gun as a black revolver. Appellant then took Margolis's watch. Reynoso approached Margolis and threw him to the ground, and both Reynoso and appellant began kicking him. At one point, Margolis saw a white Ford F-150 pickup truck parked nearby.

#### 7. Counts 3 and 4

On August 25, 2007, at 2:10 p.m., Armenak Budagyan (Budagyan) was in the parking lot of a Norm's restaurant. A white pickup truck approached him. Appellant leaned out of the pickup truck and said: "You are Armenian motherfucker." Appellant showed Budagyan a gun and demanded his wallet. Budagyan described the gun as having a brown handle. Budagyan told appellant that he did not have a wallet, so appellant drove away. Moments later, the pickup truck returned. Appellant took Budagyan's cell phone and car keys, and Reynoso shoved Budagyan.

## 8. Count 16

On August 25, 2007, at approximately 2:15 p.m., Jose Martinez (Martinez) was entering his car, which was parked on a public street. A white pickup truck pulled up in front of him. Appellant approached Martinez and pointed an object at Martinez's ribs. Martinez described the object as steel, possibly pointed at the end, and similar to a knife sharpener in appearance. Appellant demanded Martinez's money and took his wallet.

### ***B. The Arrest and Investigation***

On August 25, 2007, at approximately 1:10 p.m., Los Angeles Police Department (LAPD) Officer Berzon Distor and his partner were staking out appellant's home. They knew to stake out appellant's home because Aguilar and Solano had reported the license plate of the white pickup truck to authorities, and the truck was registered to appellant. As they were waiting, the officers saw a white pickup truck drive past them, and then saw someone in the pickup truck toss a wallet through the passenger side window. The officers directed appellant, who was driving the truck, to pull over. They arrested appellant, as well as Reynoso and Aguirre, who were also in the pickup truck.

LAPD Detective Adolfo Godinez searched the pickup truck and found several purses, wallets, identification cards, and a cell phone. Some of the items belonged to the victims identified above. On the floorboard of the pickup truck Detective Godinez also recovered two live rounds that matched a .38-caliber revolver. No gun was found inside the vehicle.

### ***C. Norma Aguirre's testimony***

Prior to Aguirre's testimony, the prosecution notified the trial court that it had offered her full immunity from her participation in the crime spree and that it intended to elicit testimony from her regarding physical abuse that appellant inflicted on her. The prosecution explained that this testimony was relevant to her credibility because it explained why she remained with appellant during the crime spree. Defense counsel objected to testimony about appellant's alleged physical abuse of Aguirre on the ground of relevancy. The trial court ruled: "We'll have to take it question by question. Not

knowing the full picture [testimony about physical abuse by appellant] sounds to me like it may certainly go to her credibility and motive.”

On direct examination Aguirre testified that she had witnessed each of the robberies described above and largely confirmed the testimony of each victim. Prior to the crime spree, Aguirre and her two young children had been living with appellant for almost two years. Aguirre testified that appellant physically abused her and recounted incidents in which he used an iron and cigarette lighter to burn her, and another incident in which he used a gun to strike her head. When asked why she simply did not leave after the first day of the crime spree, Aguirre testified that she was “very afraid” of appellant and feared for the safety of her children.

During a pause in Aguirre’s testimony on direct examination, the trial court instructed the jury as follows: “All right, Ladies and Gentlemen. The witness has just testified about acts of domestic violence. Her testimony pertaining to these alleged acts of domestic violence on her are not admitted for the truth if in fact those things occurred, they are admitted to show her state of mind as to why she didn’t go to the police or why she went along with these incidents.”

On cross-examination, defense counsel asked Aguirre why she told the police on the day she was arrested that the gun used in the crime spree belonged to Reynoso, and not appellant. Aguirre testified that appellant threatened to harm her and her children if she revealed to anyone, including the police, that the gun belonged to him. Aguirre also testified that she did not leave when the crime spree began because she was afraid of appellant and feared for her children’s safety. Also, according to Aguirre, appellant had disconnected the telephones and locked Aguirre inside their shared bedroom after the first two robberies on August 24. She explained that she had endured appellant’s violence for many months and was constantly fearful that appellant would use the gun on her. Aguirre testified that the gun appellant used during the crime spree was a real gun because he had “opened [her] head with it.”

Aguirre testified that shortly before they were pulled over by the police, appellant and Reynoso had a physical altercation with another man, and this man managed to take the gun from them during the altercation.

On redirect examination, Aguirre testified that she did not report appellant's physical abuse because appellant told her that he would kill her once he got out of prison, or he would send someone to kill her while in prison. The prosecution introduced four photographs taken by the police on the day Aguirre was arrested. The photographs depicted various injuries on Aguirre's body. Aguirre testified that her injuries were the result of appellant striking her on her head with a gun, burning her with a cigar and hot iron, and hitting her leg with a steering wheel lock.

## **II. The Defense**

Appellant testified that he committed each of the robberies recounted above, but that during each robbery he used a fake gun. Appellant had ordered this fake gun off the internet from a Web site that sold replica .38-caliber revolvers. Appellant testified that he was drunk and high on methamphetamines during the crime spree, and that he and Reynoso turned over the money they obtained to Aguirre. According to appellant, Aguirre was the "mastermind" behind some of the robberies, and had committed various types of fraud before the crime spree.

Appellant denied physically abusing Aguirre. He testified that Aguirre sustained the injury to her head during an altercation with another woman. The burn marks, according to appellant, were accidental. On one occasion, Aguirre accidentally touched a hot motorcycle muffler and another occasion, appellant accidentally dropped a cigar on Aguirre.

Appellant testified that he had previously been married to a woman named Olga Hernandez.<sup>6</sup> On direct examination, he admitted that in 2005, he pled guilty to one

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<sup>6</sup> Because Olga Hernandez shares the same last name as appellant, we will hereinafter refer to her as Olga.



misdemeanor count of spousal abuse against Olga, and one felony count of making a criminal threat against her.

On cross-examination, appellant admitted that he sent letters to Aguirre while he was detained instructing Aguirre to lie about his involvement in the robberies and to direct the blame against Reynoso. In these letters, appellant told Aguirre that the prosecution had a weak case against both of them because the gun had not been recovered, and that if they managed to pin the robberies on Reynoso, he would send money to Reynoso's family.

## **DISCUSSION**

### **I. Evidence of domestic violence against Aguirre**

#### ***A. Appellant's Contention***

Appellant challenges the admission of Aguirre's testimony regarding acts of domestic violence appellant allegedly committed against her, and four photographs depicting injuries that appellant allegedly inflicted on her. Appellant contends such evidence was irrelevant, and in the case of the photographs, also more prejudicial than probative. (Evid. Code, §§ 351, 352.) According to appellant, but for evidence of the domestic violence against Aguirre, the jury may well have believed appellant's testimony that he used a fake gun during the robberies.

#### ***B. Relevant Authority***

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court has broad discretion in determining relevance of evidence. (*People v. Riggs* (2008) 44 Cal.4th 248, 289.)

Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The court has

broad discretion when weighing evidence under Evidence Code section 352. (*People v. Champion* (1995) 9 Cal.4th 879, 913.) The trial court’s discretionary decision to admit or reject evidence pursuant to Evidence Code section 352 ““will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice.”” (*People v. Cain* (1995) 10 Cal.4th 1, 33.) Such an abuse of discretion is established only by a showing that the discretion was exercised in a manner that is ““arbitrary, capricious or patently absurd”” and resulted in a ““manifest miscarriage of justice.”” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

### ***C. Analysis***

Aguirre’s testimony regarding appellant’s acts of physical abuse against her was certainly relevant to her credibility as a witness. Aguirre testified that she went along with the robberies and did not report them to the police because she was afraid for her safety and the safety of her children. Evidence that appellant had physically abused her in the past had a tendency in reason to bolster her claim that she lived in a constant state of fear of appellant, and a tendency in reason to disprove any assumption by the jury that she was simply lying about her role in the crime spree in order to receive immunity for her participation in the crime spree. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1356 [“All relevant evidence is admissible, including evidence bearing on the issue of witness credibility”].)

The photographs of Aguirre’s injuries also had a tendency in reason to prove her claim that she was physically abused, which as we have explained above, was relevant to her credibility as a witness. The trial court admitted the photographs only after an extensive cross-examination by defense counsel during which he questioned Aguirre about why she did not leave appellant when the abuse started, why she did not escape from appellant when she had the opportunity to do so, and why she initially told the police that Reynoso, and not appellant, owned the gun. The entire thrust of the defenses cross-examination was to question Aguirre’s credibility and the veracity of her claim that

appellant physically abused her. The photographs depicting injuries to her body were certainly relevant to Aguirre's claim that appellant had physically abused her.

We likewise reject appellant's claim that the probative value of the photographs was substantially outweighed by its prejudicial effect on the jury. "The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) The first photograph, People's exhibit 55, depicted "a small laceration" on Aguirre's scalp. The second photograph, People's exhibit 56, depicted a "bruise or burn mark" on Aguirre's breast that was "not particularly inflammatory." The third photograph depicted "a faint red area above the knee" of Aguirre's left leg, that was "again, not particularly inflammatory." The fourth photograph depicted "a type of bruise or minor injury," that was "not particularly inflammatory." We have reviewed these photographs and agree with the trial court's assessment that they were not particularly inflammatory. Given their probative value in bolstering Aguirre's testimony, we conclude the trial court properly admitted them under Evidence Code section 352.

Assuming for the sake of argument that the trial court committed error, such error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)<sup>7</sup> According to appellant, because he was "an abusive boyfriend," "the jury was unlikely to closely examine and consider possible reasonable doubt as to whether or not the gun was real or

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<sup>7</sup> Appellant contends we should review the effect of the trial court's ruling under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, which is reserved for errors of a constitutional dimension. Unless a trial court's ruling "completely exclude[es] evidence of an accused's defense," the proper standard of review for an evidentiary ruling is the one announced in *Watson, supra*, 46 Cal.2d at page 836. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103.) Here, the trial court's evidentiary rulings regarding Aguirre's testimony and the photographs had absolutely no impact on his ability to testify that the gun was fake, that he was drunk and high on methamphetamines, and that Aguirre was the "mastermind" behind some of the robberies.

a replica.” We disagree. Even if the testimony and photographs concerning domestic abuse had been excluded, there was still ample evidence from which the jury could conclude that appellant was lying about using a fake gun and had in fact used a real gun during the robberies. Each of the victims (but for Martinez who did not have a gun pointed at him) consistently behaved as though the gun was real, and they all described the gun as real. Although their descriptions of the gun may have varied to a slight degree, not one victim testified that he or she believed or even suspected that the gun may have been fake. Most saliently, officers recovered live ammunition in appellant’s pickup truck. Appellant would have had no need for live ammunition with a fake gun. Although appellant claimed he placed live ammunition in the gun to make it appear real, this claim was belied by the fact that he did not offer to show the ammunition to any of the victims during the robberies.

In short, it is not reasonably probable that appellant would have received a more favorable result had the trial court excluded Aguirre’s testimony regarding the physical abuse appellant inflicted on her and the accompanying photographs.

## **II. Evidence of spousal abuse against ex-wife**

### ***A. Appellant’s Contention***

Appellant contends the trial court deprived him of his federal constitutional right to a fair trial when the trial court ruled that the prosecutor could present, for impeachment purposes, evidence of appellant’s conduct toward his ex-wife, Olga, that resulted in a misdemeanor conviction for spousal abuse in 2005. According to appellant, evidence of his “domestic history . . . with his ex-wife . . . made it more likely that the jury did not closely weigh appellant’s testimony regarding the gun.”

### ***B. Summary of Proceedings Below***

The prosecution sought to impeach appellant with evidence of appellant’s conduct that resulted in two misdemeanor convictions for spousal abuse (§ 273.5) in 2000 and 2005. Defense counsel indicated that appellant would admit that he sustained a felony

conviction for criminal threats (§ 422) against Olga in 2005, but objected to admission of the spousal abuse conduct.

The trial court held an Evidence Code section 402 hearing and ruled that the prosecution could not present evidence of any spousal abuse that occurred in 2000 because such conduct was too remote in time. The trial court, however, indicated it would allow evidence of spousal abuse that occurred in 2005, reasoning as follows: “I don’t think it’s unduly prejudicial because evidence of domestic violence has already been introduced on direct and cross through Ms. Aguirre. It is a crime of moral turpitude. It is prejudicial, obviously, but I don’t find it’s unduly prejudicial in comparison to its relevance.”

Given the trial court’s ruling, appellant admitted during his direct testimony that he sustained a misdemeanor conviction for spousal abuse against Olga in 2005.

### ***C. Relevant Authority***

The prosecution may impeach a defendant in a criminal case with evidence of prior misdemeanor conduct involving moral turpitude. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295–297.) This is because “[m]isconduct involving moral turpitude may suggest a willingness to lie” even if such misconduct does not amount to a felony. (*Id.* at p. 295.) Because “impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present . . . courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.” (*Id.* at pp. 296–297.)

### ***D. Analysis***

In our view, the trial court properly admitted evidence of the spousal abuse in 2005. Spousal abuse is conduct that involves moral turpitude because “the assailant must, at the very least, have set out, successfully, to injure a person . . . in a special relationship for which society rationally demands, and the victim may reasonably expect, stability and safety, and in which the victim, for these reasons among others, may be

especially vulnerable.” (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402.) While the crime of robbery certainly differs from spousal abuse in various respects, spousal abuse “necessarily connotes the general readiness to do evil that has been held to define moral turpitude.” (*Ibid.*)

Moreover, the 2005 conduct was fairly recent, having occurred just two years prior to the 2007 crime spree. (Accord, *People v. Foreman* (1985) 174 Cal.App.3d 175, 182 [affirming trial court’s ruling that defendant could be impeached with prior conviction for theft because the prior conviction was “recent,” having occurred two years before the current charges].)

Assuming for the sake of argument that the trial court erred by admitting evidence of the spousal abuse that occurred in 2005, such error was harmless. (*Watson, supra*, 46 Cal.2d 818.)<sup>8</sup> For the same reasons discussed above, there was ample evidence from which the jury could conclude that appellant had used a real gun during the robberies. Thus, it is not reasonably probable that appellant would have received a more favorable outcome if evidence of the 2005 spousal abuse had been excluded.

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<sup>8</sup> Although appellant claims that the trial court violated his constitutional rights by admitting evidence of the 2005 spousal abuse, he agrees that we should assess prejudice under the standard articulated in *Watson*, and not the stricter standard articulated in *Chapman*.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
CHAVEZ